

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Application No: 739/2018

In the matter between:

MAPHALE ALBERT KHOELI

Applicant

and

MINISTER OF POLICE

First Respondent

CAPTAIN KGOLANYANE
Respondent

Second

**THE REGISTRAR OF ANIMAL
IDENTIFICATION**

Third Respondent

CORAM: **MBHELE, J et MHLAMBI, J**

JUDGMENT BY: **MBHELE, J**

HEARD ON: **27 MAY 2019**

DELIVERED ON: **26 AUGUST 2019**

[1] This is a review application in which the applicant is seeking an order in the following terms (as set out in the Notice of Motion):

- i. Reviewing and/or declaring as irregular, reviewable and/or unlawful the decision and related action by the Second Respondent and/or other employees of the First Respondents on or about 30 May 2017 and/or 7 November 2017, respectively, pertaining to the declaration of forfeiture to the State and subsequent sale on or about 7 November 2017 of a total number of 42 (four Heifers, 2 (two) cows and 2 (two) calves, all of which belonged to the Applicant, and in that regard bore the animal identification mark registered to him.
- ii. Flowing from the above order, setting aside the Second Respondent's abovementioned decision to declare the Applicant's cattle forfeited to the State, alternatively declaring that such decision was contrary to the provisions of section 34 of the Criminal Procedure Act 51 of 1977, as amended (hereinafter "the CPA"), and thus unlawful.

Declaring or making an order that the Applicant suffered loss or damages as a result of the abovementioned unlawful and/or irregular decision and subsequent action by or at the behest of the Second Respondent and/or other employees of the First Respondent.

- iii. Flowing from the orders under 1,2 and 3 above, ordering the First, Second and/or Third Respondent to pay to the Applicant an amount of R 286 900-00, being the total sum for which the 42 (forty two) cattle belonging to the Applicant were sold by public auction on or about 7 November 2017.
- iv. In respect of 2(two) additional cattle, out of an initial total of 44 (forty four) cattle, which were seized from the Applicant's possession or control on or about 15 May 2017 by police officials in the employ of the First Respondent, pursuant to the provisions of section 20 and related

sections of the CPA, directing the First and Second Respondent and/or any other employees or agent of the First Respondent under whose control or possession those additional 2 (two) cattle are, as at date hereof, to restore possession thereof to the Applicant, or release them to him.

- v. Alternative to prayer 5 above, and in the event of the said additional 2 (two) cattle already having been disposed of as at the date hereof, ordering the First and/or Second Respondent to pay to the Applicant an amount of R14 488-24, being the average price for which 2 (two) oxen belonging to the Applicant were sold by public auction on or about 7 November 2017
- vi. The above orders, as applicable, to be complied with within 14 (fourteen) days of the granting thereof.
- vii. In the event of the Court finding that the application cannot properly be decided on affidavit, due to (a) material dispute(s) of fact(s) arising in the papers, in respect of the question of liability and/or quantum, directing that oral evidence be heard on the specified issues with a view to resolving any such dispute(s) of fact, or refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise, in accordance with Rule 6(5)(g) of the Uniform Rules of Court.
- viii. First Respondent to pay the costs of the application.
- ix. Granting the Applicant such further and/or alternative relief as the Court may determine.

BACKGROUND

- [2] The applicant is a citizen of Lesotho, arrested on 15 May 2017 and charged for contravention of the provisions section 32 (1) (m) (iii) of the Animal Diseases Act 35 of 1984 (The Act). 44 cattle were seized from the applicant upon his arrest. On 17 May he paid an admission of guilt fine for contravention of section 32 (1) (m) (iii) of the Act.
- [3] On 30 May 2017 the South African Police Service (SAPS) through the second respondent took a decision to declare all 44 cattle found forfeited to the state. An attempt to inform the applicant of the decision was made through calling a cell phone number that is unknown to the applicant.
- [4] The applicant obtained an order at the Magistrate's Court on 31 May 2017 to have the cattle returned to him and the first respondent successfully applied to this Court for the review of the Magistrate's order on 06 November 2017.
- [5] On 07 November 2017, 42 of the 44 cattle were sold by the SAPS for an amount of R286 900-00 after an indemnity was obtained from the third respondent. It is alleged in the respondents' affidavit that 2 of the cattle died while in custody of the SAPS. The cattle were, before their disposal, held at the Moreson detention facility of the SAPS in the district of Ladybrand.

- [6] The applicant was not notified of the decision by the first respondent to forfeit the cattle and the subsequent sale thereof. The applicant was further not informed that 2 of the cattle died in police custody before the sale. This information came to his attention for the first time when the answering affidavit was filed on behalf of the respondents.
- [7] Mr Lechwano, on behalf of the applicant, submitted that the decision by the police to forfeit the applicant's cattle and the subsequent sale was unlawful and procedurally unfair. He contended further that the action was taken arbitrarily and/or capriciously. He further contended that disposing of the applicant's cattle amounted to punishing him twice.
- [8] Ms. Wright, on behalf of the respondents, contended that the first respondent was within its right to dispose of the cattle in question without any notification to the applicant. She submitted further that the decision to dispose of the cattle was taken because there was no one who could lawfully possess them. She opined that due to the nature of the offence the applicant admitted guilt to, releasing the cattle to the applicant would have resulted in the applicant furthering the commission of the very offence he admitted guilt to. In her view, restoring the cattle to the applicant would have required him to convey the cattle through the Republic back to Lesotho. She argued that the provisions of section 32 (2) of the CPA placed no duty on the respondents to inform the applicant of the decision to forfeit the cattle.

APPLICABLE LEGAL PRINCIPLES

[9] Section 32 of the criminal Procedure Act 51 of 1977 (CPA) provides that:

“(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his guilt in accordance with the provisions of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

(2) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.”

[10] Section 31(2) reads as follows:

“(2) The person who may lawfully possess the article in question shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.”

[11] It is clear from the above that the items seized should be returned to the person from whom they were taken provided that he may possess them lawfully. They can only be forfeited to the state if there is no person who may lawfully possess them and the police

officer in charge of the investigation reasonably does not know of any person who may lawfully possess them. The cattle had a brand identification mark of the applicant and the applicant provided the police upon his arrest of documentation proving possession. Possession of the cattle was never an issue even at the time of their seizure. The issue was the failure to produce a permit authorising the applicant to import cattle from Lesotho into the Republic of South Africa. Therefore, the applicant's mere possession of the cattle would not have been unlawful. He was the lawful possessor. It follows that the first respondent should have invoked the provisions of section 32 (1) read with section 31 (2) of the CPA which required that the applicant be given 30 days' notice before his cattle could be forfeited.

[12] Section 17 (2) and (2) (B) (a) of the Animal Diseases Act 35 of 1984 provides as follows:

“(2) The director shall without delay deliver anything seized by him under subsection (1) (a) to a police official as defined in section 1 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), and it shall be disposed of in accordance with the applicable provisions of that Act relating to seizures of objects by the State

(2B) (a) Notwithstanding the provisions of subsection (2), any animal or thing which has been seized in terms of subsection (1) (a) on the ground of no permit having been obtained for the importation thereof, together with any progeny or product thereof, may, where the director is of the opinion that a permit would have been issued if an application therefor had been made, be returned to the person who has imported the animal or thing to be removed at his own expense within the period determined by the director, from the Republic.”

- [13] The Act is not punitive in its application. It does allow the director, who is a veterinarian in terms of section 2, to restore the animals seized to the person who imported them where the director is of the opinion that a permit would have been issued if an application therefor had been made. This shows that restoring the seized items to the original possessor does not necessarily create a double offence. It does make provision for the seized animals to be returned to their country of origin at the expense of the person from whom they were seized.
- [14] The Act is aimed at controlling animal diseases and parasites, providing measures to promote animal health and for matters connected therewith. It is not apparent from the papers that the director was at any stage involved with these cattle, from their time of seizure until they were disposed of. It is not clear how the purpose of the Act was achieved in the process of selling the cattle to a farmer within this country.
- [15] It is clear that sections 32 (1) and 31 (2) of the CPA seek to prevent arbitrariness on the part of the police. The police failed to notify the applicant of their decision to forfeit the cattle as required by the CPA. The argument by the respondents that the applicant could not have been the lawful possessor cannot hold centre in view of the provisions of both the Act and the CPA.
- [16] In **Electronic Media Network Limited and Others v E. TV PTY (LIMITED) and Others CCT 140/16,141/16 and 145/16** at para [98] the following was stated:

“Hence, if accountability, responsiveness and openness are fundamental to our Constitution, then a consultation process that lacks those attributes needs to be explained. Where there is no explanation there is no reason, and where there is no reason there is arbitrariness and irrationality. Neither rocket science nor judicial conspiracy are needed to understand the simplicity, logic and, yes, moral suasion of it. We see below how applying these precepts in practice should upend what happened here.”

[17] It is so that accountability and transparency are an indispensable ingredient in the day to day functioning of the organs of state; the absence of which strips the daily business of such organs of their legitimacy. The police must respect the rule of law and uphold law and order.

[18] In **Ngqukumba v Minister of Safety and Security and Others (CCT 87/13) [2014] ZACC 14; 2014 (2) SACR 325 (CC)** it was held as follows:

“[19] This reading of the two sections does not unduly thwart effective policing. Rather, it enjoins police to act not only in accordance with the Criminal Procedure Act but with the Constitution as well...”

[20] Without doubt the police play an important role in combating and preventing crime, conducting criminal investigations, maintaining public order, protecting and securing the inhabitants of South Africa and their property, and upholding and enforcing the law. Their endeavours in this regard should not be interfered with unduly. However, they, like everyone else, are subject to the Constitution, in particular — for present purposes — the rule of law. A failure to hold them to the Constitution strictly may have negative consequences: it may encourage them to be a law unto themselves...”

[19] I am unable to say that the police acted within the prescripts of the law when they took a decision to forfeit the cattle to the state and the subsequent sale thereof. Their actions were arbitrary and against the law and thus cannot be countenanced by this court. The application for review must succeed. Costs must follow the event.

[20] The following order is made:

Order:

1. The decision by the first respondent on 30 May 2016 declaring 44 cattle, bearing identification marks of the applicant and forfeited to the state, is declared unlawful and set aside.
2. The first respondent to pay the costs of this application.

NM MBHELE, J

I concur

JJ MHLAMBI, J

On behalf of the Applicant:
Instructed by:

B Monyamani
MONYAMANI & NGCANGISO INC.
BLOEMFONTEIN

On behalf of the Respondents: J.H. Engelbrecht
BLOEMFONTEIN